Supreme Court, U.S.
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In The

Supreme Court of the United States

MIGUEL GADDA, an individual,

Petitioner,

vs.

NINTH CIRCUIT COURT OF APPEALS; JOHN ASHCROFT, Attorney General; BOARD OF IMMIGRATION APPEALS; EDWARD G. KANDLER; IMMIGRATION COURT, SAN FRANCISCO; IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Ninth Circuit Court of Appeals conflict with other Circuits and this Court's precedent law in delegating its federal authority to States that expanded and empowered the State's control to discipline attorneys who practice in federal courts and federal agencies thereby conflicting with federal regulations intended to apply federal uniformity and correct duplicity of litigation?

Whether the Ninth Circuit Court of Appeals by omitting or overlooking salient sentences in the federal regulations err in misinterpreting valid federal regulations thereby giving the States deference even though the States do not have statutes, regulations or rules that control and discipline attorneys who practice in all federal courts and federal agencies?

Did the Ninth Circuit's decision conflict or deny relief under the Supremacy Clause, Preemption, Interstate Commerce Clause, Negative Interstate Commerce Clause or Due Process under the questions presented above?

PARTIES TO THE PROCEEDING

Petitioner

Miguel Gadda, an individual,

Respondents

Ninth Circuit Court of Appeals;
John Ashcroft, Attorney General;
Board of Immigration Appeals;
Edward J. Kandler, Immigration Court,
San Francisco;
Immigration and Naturalization Service

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PETITION FOR WRIT OF CERTIORARI

Petitioner Miguel Gadda respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals. (April 1, 2004)

OPINIONS BELOW

The opinion below was published. The opinion of the Ninth Circuit Court of Appeals is reproduced in Appendix 1. The opinion denying a motion to rehear and rehearing en banc and an opinion denying a Stay of Mandate were not published to the knowledge of petitioner and is reproduced in Appendices 2 and 3. Memorandum by BIA Chief Judge Creppy regarding Policy and Procedures of Attorney Discipline under the new federal regulations. Reproduced in Appendix 4.

STATEMENT OF JURISDICTION

The order of the Ninth Circuit Court of Appeals, which forms the basis of this petition for Writ of Certiorari, was entered on April 1, 2004. (App. 1). A timely petition for rehearing was denied by the Ninth Circuit Court of Appeals on May 6, 2004. This Petition for Writ of Certiorari is filed within 90 days of the denial of appeal and denial of a petition for rehearing en banc.

The United States Supreme Court has jurisdiction to review this case on petition for writ of certiorari pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED IN THIS CASE

8 U.S.C. Sec. 1103(a)(3) provides in part:

> (a) Attorney General
>
> (3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

8 C.F.R. Sec. 1001.1(f) provides in part:

> The federal regulations provide that an attorney may represent a person in immigration proceedings only if the attorney "is a member in good standing of the bar of the highest court of any state . . . .and is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law."

STATEMENT OF THE CASE

This is a case of first impression regarding the interpretation by the Ninth Circuit Court of Appeals of new valid federal regulations where the Ninth Circuit gives deference to the States regarding discipline of all attorneys that practice federal law in federal courts and federal agencies. The Ninth Circuit Court of Appeals also joined a disciplinary recommendation by the Appellate Commissioner and disbarred petitioner from practice in the Ninth Circuit Court of Appeals. *In re Gadda,* No. 02-80014. *See Gadda v. Ashcroft,* 363 F. 3d 861 (9th Cir. 2004). This

interpretation by the Ninth Circuit Court of Appeals creates a dual discipline system by both the States and Federal agencies which disrupt federal uniformity as contemplated by the federal regulations, create duplicity of hearings and litigation, different discipline by different forums and a waste of precious resources to all Courts. This decision goes against United States Supreme Court cases and other Circuit cases regarding interpretation of statutes, regulations, deference and preemption.

Petitioner was admitted to the California State Bar in August of 1975. Thereafter, through his admission to the State Bar of California, he petitioned and became a member in good standing with the District Court of California, Northern District, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States. He is also a member of the Board of Immigration Appeals and is authorized to practice before that Board, and all the Immigration courts and Immigration and Naturalization Service's offices throughout the United States. It is undisputed by all parties that he only practices federal immigration law.

A California State Bar Hearing Judge recommended that petitioner be disbarred and placed him on involuntary inactive enrollment on July 27, 2001. Petitioner since the beginning told the State Bar Court Judge that they had no jurisdiction because of new federal regulations and that it raised constitutional issues. The Judge stated the State Bar had the power and indeed had disciplined federal attorneys for many years but that they could not decide on constitutional issues.

The Board of Immigration Appeals (BIA) sided with, adopted and interpreted the State Bar's Hearing Department decision as a final order from the Supreme Court of California even though there was never any final order from the Supreme Court of California. They suspended petitioner from practicing in any Immigration Court or Immigration Office throughout the United States. The result was the loss of petitioner's law practice.

The State Bar Court Review Department after reviewing the case *de novo*, recommended that petitioner be disbarred but did not place him on involuntary inactive enrollment as required by their own rules. It designated this opinion to be published. Their opinion regarding discipline of attorneys practicing federal law was based on their interpretation that some of the sections of the new federal regulations gave the State jurisdiction and power to discipline attorneys that practice in federal courts. The State Bar Court also cited the case of (*Geibel v. State Bar* (1938) 11 Cal.2d 412, 415, 79 P.2d 1073, to claim jurisdiction to discipline any attorney that practices in federal courts and *it extended this reasoning to apply to federal agencies. Our emphasis. See In re Gadda,* 2002 WL 31012596 at *1-4. The BIA adopted this reasoning as did the District Court and the Ninth Circuit. The California Supreme Court denied a petition to review and a motion to augment the record in a one-paragraph decision making the State Bar Review's Department the final order. *Id.*

REASONS FOR GRANTING THE PETITION

This petition for writ of certiorari should be granted because the Ninth Circuit panel's creation of a new

delegation to the State's power and jurisdiction governing the discipline of attorneys practicing federal law in federal courts and agencies: (1) misinterprets, overlooks or ignores new federal regulations salient points and sentences that revamp discipline of federal practitioners; (2) conflicts with longstanding precedent of this Court and other Circuit Courts regarding deference to federal regulations; (3) undermines and constitutes an unwarranted expansion of this Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); (4) delegates its federal authority to the States to discipline attorneys who practice in federal courts and federal agencies thereby conflicting with federal regulations intended to revamp federal uniformity and correct duplicity of litigation; (5) is a case of first impression that needs to be clarified if the regulations are ambiguous; and (6) the Ninth Circuit does not have local rules elaborating on FRAP 46's "conduct unbecoming" standard as do other sister Circuits.

I. The Ninth Circuit By Misinterpreting, Omitting, Overlooking Or Ignoring Sentences Of Key Sections Of Valid Federal Regulations, Misinterpreted The Clear Meaning Of These Regulations And Gave Deference To A State That Had No Statutes, Regulations, Rules Or Was Silent On Discipline Of Attorneys Exclusively Practicing Federal Law.

The interpretation of new federal regulations would be one of first impression in all the Circuit Courts. The Ninth Circuit is the first Circuit Court to interpret the new federal regulations and their decision is contrary to this Court's precedent cases regarding deference to federal regulations and all of the other Circuit Courts. This Court

should hold that, when a state has enacted no statute or regulations providing for discipline of immigration practitioners, the procedures of the federal regulations regarding immigration practitioners should apply. *Professional Conduct for Practitioners; Rules and Procedures,* 65 Fed. Reg. 39513, 39524 (June 27, 2000).

In the instant case, the Ninth Circuit Court says that the immigration regulations expressly allow for supplementary state regulations to promote reliance and cooperation with states, territories and federal courts. *Gadda v. Ashcroft,* 363 F. 3d 861 (9th Cir. 2004). Moreover it states that the Attorney's General statement merely clarifies that the regulations are designed to implement uniform, nationwide rules of professional conduct for attorneys who practice before the immigration courts; it does not relate to state oversight of that same conduct, nor does it posit that agency oversight is the sole means of regulating immigration attorney conduct. *Gadda v. Ashcroft, Id.*

The Ninth Circuit also says that the statement goes on to further refute petitioner's interpretation by explaining the necessary cooperation between the federal immigration disciplinary process and that of the states. *Gadda v. Ashcroft, Id.*

The Ninth Circuit left out very important sentences underlined below that changes the whole interpretation and meaning of the regulations. The regulations read as follows:

> "EOIR and the Service anticipate working closely with the various state bars when investigating disciplinary complaints. *Referrals to state bars may be appropriate when a complaint does not allege a violation of the federal regulations but may allege a violation of state bar rules or regulations.*

> Cooperation between the federal government and the 51 state bar disciplinary authorities will optimize resources and minimize duplication of investigations. In general, state bars have not been resistant to the Federal government's efforts to assist in protecting the public by scrutinizing the professional conduct of attorneys. *Moreover, immigration law is a very complex area and this program may assist state bars with investigating allegations of misconduct against immigration attorneys.*"
>
> *Gadda v. Ashcroft, Id. Our emphasis.*

The Ninth Circuit by omitting, ignoring or overlooking the very important sentences underlined in the paragraph above did not interpret the regulations as dictated by plain statutory or regulatory language. Accordingly, there is a substantial question whether the Court erred in misinterpreting and thereby overturning the federal regulation's statutory and regulatory interpretation without applying the *Chevron* framework. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-844 (1984). *Cf. Satellite Broadcasting & Communications Ass'n v. Oman,* 17 F. 3d 344, 348 (11th Cir.) (when earlier panel decision did not purport to find statute's "clear meaning," subsequent panel of same court was not precluded from revisiting question of statutory interpretation), *cert. denied,* 513 U.S. 823 (1994); *Schisler v. Sullivan,* 3 F. 3d 563, 568 (2d Cir. 1993) (new regulations at variance with earlier judicial precedents must be upheld unless they exceed statutory authority or are arbitrary and capricious).

II. The Ninth Circuit's Decision Conflicts With This Court's Longstanding Precedent Regarding Deference To Federal Regulations And Conflicts With Other Circuit Courts.

Authority

"In exercising its plenary powers over immigration, Congress has granted express authority to the Attorney General to 'establish such regulations * * * as (s)he deems necessary for carrying out (her) authority" under the laws relating to the immigration and naturalization of aliens. 8 U.S.C. 1103(a)(3). Congress also provided that aliens in immigration proceedings "shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. 1362 (emphasis added). In so doing, Congress vested implied authority with the Attorney General to prescribe standards of conduct and rules of procedure that are applicable to practitioners who appear before the Board, the Immigration Courts, and the Service. . . . As noted above in the supplementary information, EOIR and the Service maintain that under the broad rulemaking authority of the Attorney General and the federal government's preemptive powers, EOIR and the Service have the authority (and indeed, have had the authority since these regulations were first adopted more than 45 years ago) to promulgate disciplinary regulations on a nationwide basis governing the privilege of appearing as an attorney or representative before the Board, the Immigration Courts, and the Service. *See* Professional Conduct for Practitioners, 65 Fed. Reg. 39513, *supra*.

A. Notice Of Proposed Rulemaking (NOPR).

In order to create a regulation, the implementing agency researches an issue to determine if a regulation is needed. If it determines that a regulation is needed in a particular area, the agency issues a Notice of Proposed Rulemaking (NOPR), which is published in the Federal Register so that members of the public have an opportunity to review the proposed rule and offer comment on it. This was done for implementing and revamping rules and procedures regarding discipline of Immigration practitioners. *See* 63 FR 2901 (January 20, 1998).

The proposed federal regulations do not contemplate a state scheme or incorporate the results of state disciplinary proceedings into its disciplinary scheme. There is no mention of State bars or States in the proposed regulations. The clear language of the proposed regulations state:

> ACTION: Proposed rule.
> SUMMARY: This rule proposes to change the rules and procedures concerning professional conduct for practitioners, which includes attorneys and representatives, who practice before the Executive Office for Immigration Review (EOIR), which includes the Board of Immigration Appeals (the Board) and the Immigration Courts, as well as the rules and procedures concerning professional conduct for practitioners who practice before the Immigration and Naturalization Service (the Service). This rule also includes a provision pursuant to section 545 of the Immigration Act of 1990, concerning sanctions against attorneys or representatives who engage in frivolous behavior in immigration proceedings. This rule outlines the authority

> EOIR has to investigate and impose disciplinary sanctions against practitioners who practice before its tribunals, and clarifies the authority of the Service to investigate complaints regarding practitioners who practice before the Service. The procedures by which disciplinary proceedings may be initiated before EOIR against practitioners who appear before the Service are also outlined. This proposed rule will allow EOIR and the Service to investigate, present, and complete disciplinary proceedings more effectively and efficiently while ensuring the due process rights of the practitioner. This proposed rule will allow frivolous claims to be resolved and meritorious cases to be completed quickly and without unnecessary delay, since the need for expeditious resolution of these cases is critical to and in the best interests of all parties involved. *Id*

The NOPR includes a preamble, requests for public comment, notices of meetings at which the regulation will be discussed (if any), and the text of the proposed regulation. The NOPR also includes a deadline for submitting public comments on the proposed regulation. Once the comment period has expired, the implementing agency considers the public comments that it receives, revises the regulation as appropriate, and issues the regulation as a final rule, which is then published in its final form in the Federal Register. *Professional Conduct for Practitioners; Rules and Procedures*, 65 Fed. Reg. 39513, 39524 (June 27, 2000).

Once a regulation has been printed in the Federal Register as a final rule, it is then "codified" and published in the Code of Federal Regulations (CFR), which is the

official record of all regulations created by the agencies of the federal government.

While only regulations (final rules) have the same force and effect as statutes, members of the regulated community like petitioner should be aware of and review the interpretative documents and adjudicatory proceedings of an agency to understand the agency's interpretation of its regulations and how the agency intends to enforce those regulations.

B. Federal Regulations are Clear in their Intent, Purpose and Meaning.

The new federal regulations state explicitly that they revamp the disciplinary system of Immigration practitioners. They are also clear in their wording and intent regarding State bars scheme in the discipline of Immigration attorneys. The following Comments and Responses are clear in their intent and purpose.

> *"State Bars Are Appropriate Entities To Handle Complaints*
>
> Comments. Many commenters said that it is inappropriate for federal agencies to unilaterally impose a national disciplinary scheme where states should have sole jurisdiction and, further, that federal regulations concerning discipline will cause confusion and uncertainty with regard to state rules. Others objected that the rule subjects practitioners to being disciplined twice for the same conduct – once by the federal government and once by the state bar. Others believed that this rule is an unnecessary and impermissible intrusion into the state law licensure process

and "to bar a lawyer from practice before an agency is unheard of."

Response: In response to the comments that claim that this regulation is an "impermissible intrusion into the state law licensure process" and that it is "inappropriate for federal agencies to unilaterally impose a national disciplinary scheme where states should have sole jurisdiction," we refer commenters to the U.S. Supreme Court decision in Sperry v. Florida, 373 U.S. 379 (1963). . . . The Supreme Court held that the federal government has preemptive powers over states' legislative and judicial authorities when acting under valid federal regulations. As noted above in the supplementary information, EOIR and the Service maintain that under the broad rulemaking authority of the Attorney General and the federal government's preemptive powers, EOIR and the Service have the authority (and indeed, have had the authority since these regulations were first adopted more than 45 years ago) to promulgate disciplinary regulations on a nationwide basis governing the privilege of appearing as an attorney or representative before the Board, the Immigration Courts, and the Service.

The commenters also claim that this regulation is unnecessary in light of the 51 state bar disciplinary agencies (including the District of Columbia) which regulate attorney conduct. . . . In response to such comments, it should be noted that immigration hearings are held in approximately 50 Immigration Courts located in 23 different states and territories. Moreover, attorneys often represent aliens in jurisdictions other than those in which they are licensed to practice law. It is imperative that EOIR and the Service

> administer a uniform disciplinary system among the respective Immigration Courts. For the reasons explained in SSA's supplementary information to their disciplinary rule, EOIR and the Service should not be expected or required to apply numerous local rules, or local interpretations of the rules, to problems that require national uniformity. Applying local rules or local interpretations in lieu of a national standard would leave immigration attorneys in one state subject to discipline, while possibly exempting immigration attorneys in another state. EOIR and the Service do not believe that it would benefit the Board, the Immigration Courts, the Service, the public, or attorneys to promote inconsistency in regulating the conduct of practitioners, who all practice before the same forum. *Id.*

Uniformity is a pillar of interpretation of statutes and regulations.

> "We recognize, however, that the issues raised here are of national importance in "an area of the law where uniformity is particularly important." *Jaramillo v. INS,* 1 F.3d 1149, 1155 (11th Cir. 1993) (en banc). We will therefore afford the Attorney General, in whom Congress has vested the authority to rule on legal questions arising from the immigration law, the opportunity to reconsider and construe § 212(h) consistent with the competing statutory, constitutional, and policy interests at stake.
>
> We remand the case to the Board of Immigration Appeals with instructions to reconsider its prior interpretation of § 212(h) in *Sanchez, Matter of Parodi,* 17 I. & N. Dec. 218 (BIA 1980) (overruling *Sanchez* would conflict with the *Parodi* extension), and *Yeung* in order to make them

consistent with the language of the statute itself. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).

See Yeung v. INS, 61 F. 3d 833 (11th Cir. 1995); *Teedeva v. INS,* 88 F. 3d 826 (9th Cir. 1996); *Cf. Brand X Internet Services v. F.C.C.*, 345 F. 3d 1120 (9th Cir. 2003) (Court bound by its own interpretation of the Telecommunications Act in *Pollard* and must vacate the FCC's Declaratory Ruling).

C. Guidance Documents.

Guidance documents are non-binding general policy and interpretative documents that describe how the agency intends to exercise its discretionary authority and explain what a statute or regulation means. These documents are an integral part of the agency's implementation and enforcement of its regulatory programs. As with preambles, these guidance documents do not state the law but rather provide insight into the agency's interpretation of its various statutory and regulatory provisions. In legal theory, the statutes and regulations remain the criteria by which an individual's actions should be decided. Practically, however, guidance documents tend to acquire a great deal of weight because the courts grant agencies a wide degree of deference in interpreting and applying their regulations. There is a memorandum by the Chief Administration Judge to all Immigration Judges, Administrators and Court Staff explaining the new federal regulation policy and procedures that revamp the old regulations. See, *Operating Policy and Procedure Memorandum 00-02; Attorney Discipline, September 14, 2000.* Appendix 4.

The regulations above are valid but the Ninth Circuit Court of Appeals decided to adopt the State's interpretation of federal regulations and delegated to the States power to discipline federal attorneys that practice federal law in all federal courts and all federal agencies within the Ninth Circuit jurisdiction and apparently throughout the United States.

This decision by the Ninth Circuit is in conflict with the decisions of the United States Supreme Court and other Circuit Court of Appeals.

III. The Ninth Circuit's Decision Conflicts, Undermines and Constitutes An Unwarranted Expansion Of This Court's Decision in *Chevron*.

As stated above, the new federal regulations complied with all the requirements to make a federal regulation valid and therefore under this Court's decisions, these regulations should be given deference.

The seminal case is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-844 (1984). This is the leading case in giving federal regulations wide latitude over state law, rules and regulations.

> Normally, when we review an agency's interpretation of the statute it is charged with administering, we apply the two-step formula set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The reviewing court must look first to the language of the statute: "If the intent of Congress is clear, that Is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

> at 842-43. If the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Where the agency's interpretation of the statute is reasonable, the court must defer. *Id. See Yeung v. INS, supra.*

That the Attorney General is the agency Congress has charged with the administration of the Immigration and Nationality Act is beyond cavil. *See* 8 U.S.C. § 1103(a)(3) *supra.*

In the instant case, there are no explicit state laws; rules and regulations that explicitly address the intent and purpose of the new federal regulations regarding discipline therefore the federal regulations should be given deference.

A. There Are No State Statutes, Rules Or Regulations That Address Discipline Of Attorneys Practicing Federal law in Federal Courts And Agencies.

There are no Statutes, Rules or Regulations which disciplines federal immigration practitioners or other practitioners that practice federal law in Courts and agencies. The State Bar Court Review Department stated that they had jurisdiction over petitioner because of (*Geibel v. State Bar* (1938) 11 Cal.2d 412, 415, 79 P.2d 1073, and also Rule 1-100(D), of The Rules of Professional Conduct. They also stated that this reasoning applies to all federal agencies as well as to all federal courts. The Ninth Circuit validated this decision making it the law of the land where the Ninth Circuit has jurisdiction. This has a tremendous impact on thousands of attorneys that

practice federal law in California and states within the jurisdiction of the Ninth Circuit.

The State Bar Court states:

> "Respondent was admitted to the practice of law in California on August 4, 1975, and has been a member of the State Bar since that time. We acknowledge that, as the State Bar concedes, neither this court nor the California Supreme Court has jurisdiction to stop respondent from practicing law in federal court. (*Ex Parte McCue* (1930) 211 Cal. 57, 66, 293 P. 47.) We also acknowledge that neither this court nor the California Supreme Court may stop respondent from practicing law in or before federal agencies. (*Silverman v. State Bar of Texas* (5th Cir.1968) 405 F.2d 410, 413-415.) However, respondent is licensed by the California Supreme Court to practice law in this state. And, based on that license, respondent applied to practice and practices law before the federal courts in this state. In addition, it is without question that respondent is permitted to practice law and represent individuals before the Board of Immigration Appeals (BIA), the immigration courts, and the Immigration and Naturalization Service (INS) only because he is licensed to practice law by the California Supreme Court.[6] (8 C.F.R. §§ 1.1(f), 292.1(a)(1); see also 8 C.F.R. § 292.1(e).)
>
> In this regard, the California Supreme Court clearly held more than 60 years ago that, "[i]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court. [Citations.]"

> (*Geibel v. State Bar* (1938) 11 Cal.2d 412, 415, 79 P.2d 1073, see also rule 1-100(D).) We conclude that this holding should be extended to attorneys practicing before federal agencies such as the BIA, the immigration courts, and the INS. (Accord *Stroe v. I.N.S.* (7th Cir.2001) 256 F.3d 498, 501-502, 504 [Seventh Circuit referred attorney to the Illinois Attorney Registration and Disciplinary Commission for misconduct that attorney committed before the BIA expressly because attorney was "a member of the Illinois bar"].) *See In re Gadda, (*State Bar Review Court*) supra.*

The Ninth Circuit agrees with this decision and incorporated it as its own allowing jurisdiction to the State Bars to discipline attorneys who practice federal law in federal courts and all federal administrative agencies. *Gadda v. Ashcroft, supra.* However, the State Bar and Ninth Circuit Courts' reliance on *Geibel* to support their analysis is incorrect. On the one hand the State Bar Court states that they cannot stop petitioner from practicing law in the federal courts or any federal agencies but that they can discipline him for practicing in those forums because he is licensed with the State of California. This is illogical because petitioner is also licensed with the Federal bars and Immigration bars and is subject to their rules and regulations, which include the new federal regulations regarding discipline.

B. *Geibel* Case Is Not Applicable.

Geibel is a 65-year old case decided in 1938. Geibel was involved in trusts in Arizona and also practiced law in California. Geibel and two other attorneys associated with these trusts, were suspended for one year and 90 days respectively for having aided and abetted two unlicensed

persons to practice law and in the collection of fees for maintaining five vexatious and malicious suits in federal court, which suits were dismissed before trial.

This case states in part:

> "The instrument creating each of said trusts, except the Holmgreen Estate, Ltd., was drawn by J. J. Driscoll and Anita Le Bourgeois, referred to throughout the proceedings as Madame Le Bourgeois. Said persons were not licensed as attorneys in the state or federal courts in this state. All or some of these declarations of trust, as well as others prepared by Driscoll and Madame Le Bourgeois, were recorded in Arizona. It does not appear that said instruments were entitled to be recorded there. There is no suggestion that the trusts in any case involved Arizona lands. The instruments generally gave as the principal place of business of the trust estate an address which was shown in the proceedings herein to be that of the 'All Car Rapid Auto Wash' in Phoenix, Arizona. By arrangement with the owner, cards had been tacked to the wall of a shack on the premises to the effect that the location was the general headquarters of two trust estates other than those listed in the order to show cause. The declaration of trust creating the Holmgreen 'benevolent trust' was drawn by petitioner Geibel." *Geibel v. State Bar, supra.*

The State Bar Court Review Department cited this case and parts of the regulations, which say that an attorney must be a "member in good standing of the bar of the highest court of any State . . . and is not under any order of any court suspending, enjoining, restraining, disbarring, or other wise restricting him in the practice of law." 8 C.F.R. Sec. 1.1(f); Sec. 292.1(a)(1) & (e) *supra.*

(Duplicated in 8 C.F.R., Chapter V as parts 1292.1(a)(1) & (e), 1001.1(f).). The California State Review Court found this nexus to discipline petitioner and all attorneys that practice in federal courts and further extended their reasoning to apply to all attorneys practicing in federal agencies. This case is 65 years old, and there were no federal regulations regarding discipline of attorneys practicing immigration law. It fails to support the proposition as represented and is "trampling on graves". The BIA agreed with the Review Department's decision and also stated that:

> "There is no basis for arguing that the respondent is not under the jurisdiction of the California State bar simply because he practices immigration law. *See Waters v. Barr*, 747 P.2d 900, 902 (Nev. 1987) (finding that assistant United States attorneys who were admitted to practice or engaged in the practice of law in Nevada were subject to discipline by the state's Supreme Court and stating that there is "no question that an attorney may be subjected to discipline from any bar association to which he is a member").
>
> Petition for writ of mandamus was filed to compel former counsel for state bar to investigate private complaint against two assistant United States attorneys, one of whom was member of state bar, and other who was not. The Supreme Court held that: (1) state Supreme Court had jurisdiction over assistant United States attorney who was member of state bar, and (2) state Supreme Court had jurisdiction to discipline assistant United States attorney who was not member of state bar, but who practiced law in federal courts in Nevada. This petition for a writ

> of mandamus challenges the refusal of a former counsel for the State Bar of Nevada to investigate a private complaint against two Assistant United States Attorneys. One of these attorneys is a member of the State Bar of Nevada; the other is not. We note that shortly after defending this petition ostensibly on behalf of the state bar, former bar counsel resigned as bar counsel and accepted a position as an Assistant United States Attorney." *Id.*

See Matter of Gadda, 23 I&N Dec. 645, 648 (BIA 2003) ID 3496.

Petitioner finds the *Waters* case fails to support the proposition as represented. Petitioner has never been an assistant United States Attorney that was admitted to practice or engaged in practice of law in Nevada or employed by the Department of Justice or any other federal agency. Petitioner has never been a member of the State Bar of Nevada or practiced State or Federal law in that State. The Ninth Circuit erred in misinterpreting federal regulations and adopting the reasoning of the State Bar Court and BIA's decisions thereby making these decisions precedent law.

C. The Rules of Professional Conduct and Discipline Concerning a Practitioner's Conduct in Immigration and Naturalization Cases are within the Exclusive Jurisdiction of the Federal Sovereign.

In *Birbrower, et al. v. Superior Court of Santa Clara County*, 930 P. 2d 399, 60 Cal. Rptr. 2nd 606 Cal. Jan. 15, 1997, which was decided by the California Supreme Court on January 5, 1998. The State Supreme Court stated, at

109, "The [State Bar] Act does not regulate practice before United States Courts." The California Supreme Court in *In re McCue* (1930) 211 Cal. 57, 66, 293 P. 47 held that,

> "The State Bar Act and other statutes enacted for the purpose of regulating the practice of law in this state are applicable to our state courts only. The federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct. This state, should it attempt, and we do not think it has, to regulate the practice of law in the federal courts or to place any restrictions or limitations upon the persons who might appear before the federal courts within this state, would be acting entirely without right and beyond its jurisdiction." *Id.*

The California Supreme Court in *In re McCue*, *supra*, at 66, held that, "It follows, therefore, that applicant's activities before the federal courts of this district were not subject to criticism, nor do they furnish any legal reason why he should be refused admission to practice in the courts of this state."

D. Immigration Attorneys are Subject to Federal Rules of Professional Conduct and not the California Rules of Professional Conduct.

The attorney is admitted as an attorney by the Department of Justice of the United States Government to appear in immigration matters before its Immigration and Naturalization Service. Attorney rules of professional conduct in such matters are not those of any State, but are those for accredited representatives established by the United States Government. Discipline for professional

misconduct relating to immigration matters is based solely on violation of the applicable federal rules of professional conduct for attorneys. Discipline of attorneys rests exclusively within the jurisdiction of the Immigration and Naturalization Service and its judges, Board, or the United States Attorney as set forth in the new federal regulations now codified under the Code of Federal Regulations for the DHS Immigration and Naturalization Service and based on its different rules of professional conduct. *See* 8 C.F.R. Subpart G, Secs. 1003.101 to 1003.107 (2003).

E. The California Rules of Professional Conduct Do not Apply to an Attorney that Only practices Federal Law in Courts or Federal Agencies.

The California Rules of Professional Conduct, Rule 1-100(D) (1) states that:

> "These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules."

The undersigned attorney is lawfully practicing law outside of the State. The United States government is not a matter within the State, but is geographically located in all of the States and forming a separate sovereign outside of the jurisdiction of any State. In addition, the Department of Justice requires the member to follow "rules of professional conduct different from these (the California) rules." He is required to follow Title 8 of The Code of Federal Regulations. *See* 8 C.F.R. *supra.*

IV. The Ninth Circuit Court Of Appeals Delegated Its Federal Authority To States That Expanded And Empowered The State's Control To Discipline Attorneys Who Practice In Federal Courts And Federal Agencies Thereby Conflicting With Federal Regulations Intended To Revamp Federal Uniformity And Correct Duplicity Of Litigation.

A federal court that delegates its federal authority to a State without express standards implementing that delegation is delegation running riot.

The regulations above are valid but the Ninth Circuit Court of Appeals decided to adopt the State's interpretation of federal regulations and gave the States power to discipline federal attorneys that practice federal law in all federal courts and all federal agencies within the Ninth Circuit jurisdiction and apparently throughout the United States. A federal court that delegates its federal authority to a State without express standards implementing that delegation is delegation running riot. Last term, the United States Supreme Court in *Nguyen v. United States*, 593 U.S. 69 (2003), reversed the Ninth Circuit merely for having an Article IV judge sitting on a panel. The High Court concluded that only Article III judges were authorized to decide the case.

The Ninth Circuit agrees with the BIA and District Courts' decisions and incorporated it as its own allowing jurisdiction to the State Bars to discipline attorneys who practice federal law in federal courts and all federal administrative agencies. *Gadda v. Ashcroft, supra*. However, all of the Courts' reliance on *Geibel* and some sections of the new federal regulations are incorrect when taken and interpreted as the intent of these regulations. On the

one hand the State Bar Court states that they cannot stop petitioner from practicing law in the federal courts or any federal agencies but that they can discipline him for practicing in those forums because he is licensed with the State of California. This is illogical because petitioner is also licensed with the Federal Bars and Immigration bars and is subject to their rules and regulations.

V. The Federal Regulations Are Not Ambiguous And If Ambiguous Should Be Interpreted, Clarified And Given Deference. This Is A Case Of First Impression.

A. Ambiguous Statutes Or Rules Must Be Given Deference If Reasonable.

If the statute were thought ambiguous, however, the reading of regulations must be accepted; nonetheless, provided it is a reasonable interpretation. *See Chevron U. S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. *Chevron*, 467 U.S., at 862. In *Chevron*, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.*, at 863-864. An agency is not required to "'establish rules of conduct to last forever,'" *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983), quoting *American Trucking Assns., Inc. v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 416 (1967); *NLRB v. Curtin*

Matheson Scientific, Inc., 494 U.S. 775 (1990), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfrs.*, supra, at 42, quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968). Another basis for this deference is the agency's presumed expertise. *Simpson v. Young*, 854 F. 2d 1429 (D.C. Cir.1988); *The Mead Corp. v. United States*, 533 U.S. 218 (2001). The third area in which courts have typically given deference to agency decision making involves the agency's interpretation of its own regulations. An earlier line of cases required courts to accept reasonable agency interpretations of their own regulations. The original case was *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and that case continues to be frequently relied upon. In *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), the Court relied on Bowles to give "substantial deference to an agency's interpretation of its own regulation. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id. at 510-11.

When the text of a statute is ambiguous, we "must consider '[t]he purpose, the subject matter, the context [and] the legislative history' of this statute." *United States v. Miguel,* 49 F. 3d 505, 507 (9th Cir. 1995) (quoting *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313 (1978) (alterations in original)). We also "grant a degree of deference to the interpretation of an administrative agency charged with implementing the statute or provision in question when the agency's interpretation is a permissible construction of

the statute." *Luu-Lee v. INS*, 224 F. 3d 911, 914 (9th Cir. 2000) (internal quotation marks omitted).

There are no California statutes or regulations that expressly contemplate and direct discipline on federal immigration practitioners. This Court should hold the same and give deference to the federal regulations thereby preempting jurisdiction of the state. The Ninth Circuit Court in its decision of April 1, 2004 states that federal regulations expressly provide for supplementary state regulation., *Gadda v. Ashcroft, supra.* Therefore the Ninth Circuit Court by interpreting the new federal regulations, grant the State of California "supplementary state regulations" on disciplining immigration attorneys that only practice immigration law, where there were none before.

B. The Ninth Circuit's Decision Creates Two Schemes Of Discipline By The States And Federal Courts And Agencies That Are In Conflict With The Federal Regulations.

The Ninth Circuit Court interpreted in their decision that the regulations expressly provide the states a scheme in the disciplinary process. The Ninth Circuit Court's decision allows both the state and federal agencies dual discipline on the same complaints. This would mean duplicity of hearings under different grounds, statute of limitations and different decisions as to the discipline imposed by the forums. Appeals, motions, discovery, witnesses and transcripts would have to be duplicated and the final decision may be different in both forums, which would lead to more litigation. This is exactly what happened in this case.

Moreover, state and federal regulators would have to grapple with the issue of how to allocate regulatory responsibilities that have different grounds, statute of limitations, etc., with respect to the "discipline of immigration practitioners" component that, under the Ninth Circuit Court's decision, would exist within both state and federal disciplinary agencies. Petitioner had hearings, motions, discovery and trials with the State Bar and the Federal BIA bar, which resulted in different imposition of discipline.

In addition to affecting immigration practitioners by multiple discipline hearings and appeals, it also impacts their clients or any person that wants to file a complaint against an immigration attorney. Since both state and federal agencies have their different complaint forms and procedures, a person that wants to file a complaint will have two options: State or Federal. The Ninth Circuit Court's decision will create uncertainty and confusion surrounding these issues and will spawn complex and burdensome court and/or agency proceedings at the federal and state levels.

C. *Selling, Ting*, And FRAP 46.

Petitioner alleges that *Selling* and *Ting* support petitioner's arguments if the Ninth Circuit had given deference to the federal regulations. *See Selling v. Radford,* 243 U.S. 46, 51 (1917); *Ting v. AT&T,* 319 F. 3d 1126, 1136 (9th Cir. 2003). If the Ninth Circuit had given deference to the federal regulations then there would have been preemption. Also, there are no State statutes, or regulations or rules that addressed the discipline of federal

practitioners that only practiced federal law in federal courts and agencies.

VI. The Ninth Circuit Has Not Adopted Local Rules Elaborating On FRAP 46's "Conduct Unbecoming" Standard As Have Other Circuit Courts. The Supreme Court Of The United States Has Never Directly Construed Its Own "Conduct Unbecoming" Language.

The Ninth Circuit in its decision states that they have independent authority to disbar petitioner under FRAP 46(b)(1)(B) even if the California courts had not acted to disbar him. *Gadda v. Ashcroft, supra.* However, the Ninth Circuit has not adopted local rules elaborating on FRAP 46's "conduct unbecoming" standard unlike other sister Circuits. The cases cited by the Ninth Circuit do not have the same facts or issues and most importantly do not support the proposition as stated. They also state that the United States Supreme Court has never directly construed its own "conduct unbecoming" language. *Gadda v. Ashcroft, supra*, n.7.

Also, *conduct unbecoming* under FRAP 46 and other issues as raised by the Ninth Circuit Court relied on the Review Department's decision based on complaints to the State Bar. There were no complaints filed against petitioner in the federal disciplinary scheme. This was an appeal of a denial of a preliminary injunction by a District Court, which has taken over two years to decide and denied petitioner due process and was prejudiced because he lost his law practice but most important his clients were prejudiced and left without guidance.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the Ninth Circuit Court of Appeals or grant a writ of certiorari.

Respectfully submitted,

MIGUEL D. GADDA
In Pro Se

APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL GADDA, Esq., *Petitioner-Appellant*, v. JOHN ASHCROFT, Attorney General, U.S. Attorney General; BOARD OF IMMIGRATION APPEALS; EDWARD G. KANDLER; IMMIGRATION COURT, SAN FRANCISCO; IMMIGRATION AND NATURALIZATION SERVICE, *Respondents-Appellees.*	No. 02-15113 D.C. No. CV-01-03885-PJH OPINION

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted April 1, 2004*
San Francisco, California

In re: MIGUEL GADDA, Esq., Admitted to the Bar of the Ninth, Circuit: 23 April 1985, *Respondent.*	No. 02-80014 Original Proceedings ORDER

* The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. 34(a)(2).

Filed April 1, 2004

Before: Robert R. Beezer, Sidney R. Thomas, and Richard R. Clifton, Circuit Judges.

OPINION BY JUDGE BEEZER

COUNSEL

Miguel D. Gadda, Esq., San Francisco, California, *pro se*, for the petitioner-appellant.

Jocelyn Burton, Esq. and Robert Yeargin, Esq., Assistant United States Attorneys, San Francisco, California, and David J. Kline, Esq. and Hugh G. Mullane, Esq., United States Department of Justice, Washington, D.C., for respondents-appellees John Ashcroft, United States Attorney General, and Board of Immigration Appeals.

OPINION

BEEZER, Circuit Judge:

On July 30, 2001, the California State Bar Court (the "State Bar Court") found that Miguel Gadda, Esq. repeatedly failed to perform legal services competently. It placed Gadda on involuntary inactive status and recommended that Gadda be disbarred.

This opinion and order relate to two federal proceedings resulting from the State Bar Court's recommendation. In the first, Gadda appeals an order of the United States District Court for the Northern District of California, which denies Gadda's motion to preliminarily enjoin the Board of Immigration Appeals ("BIA") decision to suspend him from practice based on his suspension by the State

Bar Court. *Gadda v. Ashcroft,* No. 02-15113. Gadda asserts that the State Bar Court cannot affect his right to practice before the BIA. The other proceeding is a disciplinary action initiated by this court after we received notice of Gadda's suspension from practice by the State Bar Court. *In re Gadda,* No. 02-80014.

Gadda argues that any reciprocal discipline imposed by the BIA or by this court based on the State Bar Court's suspension order is invalid because the Supreme Court of California lacked jurisdiction to discipline him. He claims that federal law preempts the states' authority to regulate attorneys, like him, who practice only in the administration of immigration law and in the federal courts, but not in the state courts. Because both of these proceedings involve the same underlying preemption issue, we consolidate them for opinion purposes only.

We conclude that federal law does not preempt the Supreme Court of California's authority to suspend or disbar attorneys admitted to practice in California state courts. The Supreme Court of California's discipline orders may serve as the basis for reciprocal disbarment actions by both the BIA and this court.

We disbar Gadda from the practice of law before the United States Court of Appeals for the Ninth Circuit.

I

Gadda was admitted to the California State Bar in 1975. Thereafter, he was admitted to practice law and became a member of the bar of the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit, and the

Supreme Court of the United States. He was also admitted to practice before the Board of Immigration Appeals ("BIA") and was authorized to appear for clients before the BIA and in all Immigration Courts throughout the United States.

A. California State Court Disciplinary Proceedings

On August 26, 2002, the Review Department of the California State Bar Court (the "Review Department") affirmed the State Bar Court's decision recommending Gadda's disbarment and placing him on involuntary inactive status. *In re Gadda,* Nos. 97-O-15010, 98-O-02100, 2002 WL 31012596, at *1 (Cal. Bar Ct. Aug. 26, 2002). On January 22, 2003, the Supreme Court of California ordered that Gadda be disbarred from the practice of law in California, effective February 21, 2003. *In re Gadda*, No. S111517 (Cal. 2003).

The Review Department's opinion surveyed Gadda's history of federal immigration practice, concluding that "disbarment is warranted under the circumstances for the protection of the public, the courts, and the legal profession." *In re Gadda,* 2002 WL 31012596, at *1. The Review Department cited seventeen acts of misconduct extending over six years and involving eight federal immigration client matters and one client trust account matter. This misconduct included Gadda's failure to appear at scheduled court conferences and to keep clients apprised of the proceedings and relevant court dates. Five of Gadda's clients were ordered deported in absentia and at least six courts found Gadda to have provided ineffective assistance. The Review Department concluded that Gadda

failed "to perform legal services competently, demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, and significantly harmed clients." *Id.* at *32; *see id.* at *4-30. (discussing Gadda's misconduct). The Review Department determined that aggravating factors, including prior discipline for similar misconduct in 1990, *see Gadda v. State Bar,* 787 P.2d 95 (Cal. 1990), out-weighed any mitigating factors Gadda presented. *Id.* at *30-33.

We incorporate by reference that portion of the Review Board's opinion which inventories Gadda's incompetence between 1994 and 1999. Of the eight federal immigration client matters which the Review Board describes, that of the Saba family is especially egregious.

The four minor Saba children applied for political asylum. After the INS denied their application, the children retained Gadda to represent them. Gadda advised the children to withdraw their asylum claim; the Immigration Judge ("IJ") ordered that they voluntarily depart from the United States. Thereafter, the children's parents became naturalized citizens. The children were eligible for priority consideration of their application for adjustment of status to legal residency or citizenship based on their parents' naturalization. However, as a result of Gadda's neglect and incompetence, the children were deprived of an adjustment of their immigration status, and ultimately were placed in deportation proceedings.

Gadda moved for a stay of the children's deportation. In the course of a hearing on that motion, Gadda left the Saba family unrepresented before an immigration officer. Gadda also directed the children to sign a statement promising they would voluntarily depart once the stay

expired. The immigration court granted the stay but the children did not depart as promised. Gadda assured the children that he was appealing the earlier BIA decision.

Because Gadda negligently allowed the time for an appeal from the BIA to this court to lapse, he was forced to seek habeas corpus relief before the district court. Gadda directed William Gardner, an attorney Gadda employed on a contract basis but did not supervise, to file the habeas petition. Before Gardner filed the habeas petition, the IJ ordered the Saba children to be deported on account of their refusal to depart voluntarily at the expiration of the stay. Gadda once again advised the children not to comply with the court's order.

Gardner subsequently filed the habeas petition and the district court ordered a hearing. The district court made a sua sponte finding of ineffective assistance by Gadda and remanded the matter to the immigration court to reopen the deportation hearing. *Saba v. INS,* 52 F.Supp.2d 1117, 1126 (N.D. Cal. 1999). By the time the case was heard, two of the Saba children were no longer minors. Gadda has not refunded the $3,000 the Saba children paid him.

Regarding the Saba matter, the Review Department agreed with the State Bar that Gadda "recklessly and repeatedly fail[ed] to perform legal services" and "failed to refund unearned fees promptly upon termination." *In re Gadda,* 2002 WL 31012596, at *6-7. Specifically, the Review Department found Gadda's performance incompetent in the following ways:

> (1) by leaving the children alone, unrepresented, in the middle of a hearing before an immigration

> officer and advising them to sign a voluntary departure form; (2) by failing to advise the Saba children to depart on or before [the deadline]; (2) by failing to [timely] move to reopen deportation proceedings . . . ; (4) by failing to file a petition for review with the Ninth Circuit; (5) by failing to file for adjustment of status after Mrs. Saba became a naturalized citizen . . . and instead filing for adjustment of status on the children's last day to depart voluntarily, approximately three months later; and (6) by failing to supervise Gardner in filing a petition for writ of habeas corpus.

Id. at *6.

B. *Gadda v. Ashcroft*, No. 02-15113 – appeal from BIA disciplinary proceedings

Based on the State Bar Court's order, on October 2, 2001, the BIA suspended Gadda from practice before the BIA, the Immigration Courts, and the Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service ("INS").[1] Gadda unsuccessfully sought a preliminary injunction of the BIA's action in the district court. *See Gadda v. Ashcroft*, No. C-01-3885-PJH (Dec. 7, 2001). Gadda appealed the denial of the preliminary injunction to this court. We deferred submission pending the outcome of disciplinary proceedings before the

[1] As a result of the transfer of the functions of the INS to the DHS, the regulations in chapter I of the Code of Federal Regulations were transferred or duplicated to a new chapter V, and this regulation is now codified at 8 C.F.R. § 1003.105. *See* Aliens and Nationality; Homeland Security; Reorganization of Regulations, 68 Fed. Reg. 9824, 9831 (Feb. 28, 2003).

BIA. *See Gadda v. Ashcroft,* No. 02-15113 (9th Cir. Feb. 6, 2003) (order).

Meanwhile, the Office of General Counsel for the Executive Office for Immigration Review ("EOIR") initiated disciplinary proceedings and an adjudicatory official suspended Gadda indefinitely from practice on August 22, 2002. On July 8, 2003, the BIA dismissed Gadda's appeal and ordered him expelled from practice before the BIA, the Immigration Courts, and the DHS. *In re Gadda,* 23 I&N Dec. 645, 649 (BIA 2003).[2]

C. Ninth Circuit Disciplinary Proceedings, No. 02-80014

On May 29, 2002, pursuant to Ninth Circuit Rule 46-2(c), we ordered Gadda to resign from the Ninth Circuit's bar or show cause why he should not be suspended or disbarred based on the California State Bar Court's order placing him on involuntary inactive status and recommending that he be disbarred. Gadda responded and we referred the case to the Appellate Commissioner. *See* 9th

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[2] On July 14, 2003, in light of the BIA's expulsion order, the Government moved to dismiss Gadda's appeal as moot. Although the BIA's final order does moot Gadda's appeal from the district court's denial of his preliminary injunction, we address Gadda's underlying preemption issue. As noted, Gadda alleges that federal preemption deprives the Supreme Court of California of jurisdiction to suspend him, rendering the BIA's reciprocal disbarment invalid. Gadda raises this same argument with respect to the Appellate Commissioner's recommendation of reciprocal disbarment, discussed *infra.*

In response to the BIA's expulsion order, Gadda appealed to the district court on October 23, 2003. On December 12, 2003, Gadda moved this court "to augment the record and offer opposing counsel to settle cases pending before the district court and the Ninth Circuit or judicial notice of the court's record." We hereby deny Gadda's motion.

Cir. R. 46-2(f). On September 25, 2002, the Appellate Commissioner stayed the disciplinary proceedings pending a decision by the Supreme Court of California on the State Bar Court's recommendation or a decision by us in *Gadda v. Ashcroft,* No. 02-15113.

Following the Supreme Court of California's January 22, 2003 order disbarring Gadda, the Appellate Commissioner again ordered Gadda to resign from the bar of the United States Court of Appeals for the Ninth Circuit or show cause why he should not be suspended or disbarred. Gadda requested a stay, claiming that the Supreme Court of California's disbarment order was not final and that we should first resolve *Gadda v. Ashcroft,* No. 02-15113.[3]

The Appellate Commissioner conducted a hearing on March 27, 2003 and filed a report and recommendation on May 22, 2003. The Appellate Commissioner recommends that Gadda be disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit.

II

"Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself,

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[3] Gadda's motion to stay the Supreme Court of California's disbarment order is now moot. The Supreme Court of California has denied Gadda's motions to reconsider or reopen its disbarment order and his request for a stay of that order. On June 23, 2003, the Supreme Court of the United States denied Gadda's petition. *Gadda v. State Bar of California,* 123 S.Ct. 2618 (2003) (mem.). The Supreme Court of California disbarment order is final. *See* Cal. Ct. R. 953(a).

an instrument or agency to advance the ends of justice." *In re Snyder,* 472 U.S. 634, 644 (1985) (quoting *People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 470-71 (1928) (internal quotations and alterations omitted). We have both statutory and inherent power to suspend or disbar an attorney who has been admitted to this court's bar.

Federal Rule of Appellate Procedure ("FRAP") 46 regulates attorney conduct, including admission to the bar of the Ninth Circuit and the conditions for suspension and disbarment. FRAP 46 provides that a member of this court's bar is subject to suspension or disbarment if the member either (1) "has been suspended or disbarred from practice in any other court"; or (2) "is guilty of conduct unbecoming a member of the court's bar." Fed. R. App. P. 46(b)(1)(A).[4]

A. Reciprocal Discipline

In this case, Gadda's suspension and disbarment from the practice of law in California forms the basis for his disbarment from the BIA and this court. Gadda argues

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[4] Ordinarily, suspension or disbarment is not appropriate for conduct that is aberrant to an attorney's practice and/or does not affect our ability to function in the public interest. The federal courts, with the approval of Congress, have promulgated disciplinary rules pursuant to their general rule-making authority to regulate this lesser conduct. Fed. R. App. P. 38 (providing for the imposition of "just damages and single or double costs to the appellee" for frivolous appeals); 46(c) (allowing for appropriate disciplinary action); *see Gallo v. United States Dist. Ct.,* 349 F.3d 1169, 1179-80 (9th Cir. 2003) ("Federal courts have inherent and broad regulatory authority to make rules respecting the admission, practice, and discipline of attorneys in the federal courts."). We also have authority under 28 U.S.C. § 1827 to hold attorneys personally liable for excessive costs for unreasonably multiplying proceedings.

that such reciprocal discipline is inappropriate because the Supreme Court of California did not have jurisdiction to discipline him.

We are not conclusively bound by the State Bar Court's suspension of Gadda or the Supreme Court of California's disbarment. *In re Kramer,* 282 F.3d 721, 723 (9th Cir. 2002); *In re Rosenthal,* 854 F.2d 1187, 1188 (9th Cir. 1988) (per curiam). We independently examine the State Bar Court's proceeding.[5] *Kramer,* 282 F.3d at 723. We will extend great deference to the state court's determination unless our independent review reveals one of the following conditions: (1) a lack of due process; (2) insufficient proof of attorney misconduct; or (3) "some other grave reason exist[s] that should prevent the court from recognizing the state court's determination." *Id.* (citing *Selling v. Radford,* 243 U.S. 46, 51 (1917)); *see also Kramer,* 282 F.3d at 724.

Gadda bears the burden of demonstrating, through clear and convincing evidence, that one of the above *Selling* conditions exists. *Kramer,* 282 F.3d at 724-25. We presume the correctness of the State Bar Court's factual findings. *Rosenthal,* 854 F.2d at 1188.

Gadda does not argue directly that any of the *Selling* conditions existed in the California proceedings; instead, he argues more generally that the Supreme Court of California did not have jurisdiction to disbar him. Gadda

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[5] Because the Supreme Court of California summarily denied Gadda's petition for a writ of review, we examine the Review Department's opinion, which is the final judicial determination on the merits. *See* Cal. Ct. R. 954(b) (State Bar Court recommendation is filed as an order of the Supreme Court upon denial of petition for review).

contends that he practices only federal immigration law and that Congress has granted exclusive authority to the United States Attorney General to discipline attorneys who appear before the BIA, Immigration Courts, and the DHS. He argues that federal law preempts a state's authority to discipline or regulate the conduct of attorneys who, like him, practice exclusively in the immigration or federal courts and, accordingly, the Supreme Court of California lacked jurisdiction to disbar him. Gadda's preemption argument lacks merit.[6]

We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation. *See Ting v. AT&T,* 319 F.3d 1126, 1136 (9th Cir. 2003). Gadda does not contend that attorney discipline is such an area. In fact, the opposite is true. The Supreme Court of the United

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[6] Gadda raised this identical issue before the California disciplinary proceedings, where it was addressed and rejected by the State Bar Court Review Department. *In re Gadda,* 2002 WL 31012596, at *1-4. The Review Board stated that the Supreme Court of California has the inherent power to discipline attorneys licensed to practice in the State of California: "[I]f an attorney admitted to practice in the courts of this state commits acts in reference to federal court litigation which reflect on his integrity and fitness to enjoy the rights and privileges of an attorney in the state courts, proceedings may be taken against him in the state court." *Id.* at *2 (quoting *Geibel v. State Bar,* 79 P.2d 1073 (1938) (internal quotations omitted)). The Review Department extended this reasoning to apply to federal agencies.

The Supreme Court of California also implicitly rejected this argument when that court denied review of the State Bar Court's recommendation to disbar Gadda. *See In re Rose,* 993 P.2d 956, 973 (Cal. 2000) (Supreme Court of California conducts de novo review of facts and law when attorney petitions for review of State Bar Court recommendation of disbarment).

As noted above, Gadda also raised this issue in *Gadda v. Ashcroft,* No. 15113, seeking to invalidate his suspension by the BIA.

States has long recognized that the several states have an important interest in regulating the conduct of the attorneys whom they license. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 434 (1982); *see also Theard,* 354 U.S. 278, 281 (1957) ("The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over their officers."); *cf. Matter of Abrams,* 521 F.2d 1094, 1101 (3rd Cir. 1975) (recognizing the "absolute and unfettered power" of the federal courts to admit and discipline members of its bar independently and separately from admission and disciplinary procedures of the state courts).

Federal law may preempt state law in three ways: (1) express preemption; (2) field preemption; and (3) conflict preemption. *See Ting,* 319 F.3d at 1135.

Express preemption occurs when Congress enacts a statute that expressly commands that state law on the particular subject is displaced. *Id.* Gadda does not contend that any such statute exists.

Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states. *See Id.* at 1136. In this case, Gadda argues that the regulation of immigration attorneys in California is comprehensively covered by the federal regulatory scheme governing attorney conduct before the BIA, Immigration Courts, and the DHS. Gadda claims that this federal scheme leaves no room for additional attorney regulation by California. The federal regulations provide that an attorney may represent a person in immigration proceedings only if the attorney "is a member in good standing of the bar of the highest court of any State . . . and is not

under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law." 8 C.F.R. §§ 1292.1(a)(1) & (e), 1001.1(f). Beyond merely leaving room for supplementary state regulation, the immigration regulations *condition* an attorney's ability to practice in immigration court on the attorney's good standing as a member of the bar of a state court.

We observe that the immigration regulations expressly allow for supplementary state regulation. For example, absent good cause, the BIA must immediately suspend an attorney who has been disbarred or suspended from practice on an interim or permanent basis by the highest court of any state, territory, the District of Columbia, or any federal court. 8 C.F.R. § 1003.103(a)(1), (2). An immigration attorney also has a duty to inform the EOIR if he or she has been disbarred or suspended by the highest court of any state or territory, or by a federal court. 8 C.F.R. § 1003.103(c). A final order of disbarment or suspension by a state or territory or federal court constitutes a rebuttable presumption that disciplinary sanctions should be imposed by the BIA. 8 C.F.R. § 1003.103(b)(2); *see* 8 C.F.R. §§ 1292.3(c)(3)(ii), 1003.102(e).

The immigration regulations thus promote reliance on and cooperation with the states, territories, and federal courts. They seek to ensure that qualified attorneys practice before the BIA, Immigration Courts, and the DHS, and that their standards for practice are not contrary to the applicable disciplinary rules of other jurisdictions. The federal immigration regulatory scheme does not occupy the field of discipline for immigration attorneys.

Gadda maintains nonetheless that the interpretation of the applicable regulations by the Attorney General acts to preempt the field. Gadda cites the following statement by the Attorney General regarding the most recent amendments to the federal regulations controlling the attorney discipline system in the BIA and Immigration Courts:

> It is imperative that EOIR and the Service administer a uniform disciplinary system among the respective Immigration Courts. For the reasons explained in SSA's [Social Security Administration] supplementary information to their disciplinary rule, EOIR and the Service should not be expected or required to apply numerous local rules, or local interpretations of the rules, to problems that require national uniformity. Applying local rules or local interpretations in lieu of a national standard would leave immigration attorneys in one state subject to discipline, while possibly exempting immigration attorneys in another state. EOIR and the Service do not believe that it would benefit the Board, the Immigration Courts, the Service, the public, or attorneys to promote inconsistency in regulating the conduct of practitioners, who all practice before the same forum.

Professional Conduct for Practitioners; Rules and Procedures, 65 Fed. Reg. 39,513, 39,524 (June 27, 2000).

Contrary to Gadda's assertion, the Attorney General's statement merely clarifies that the regulations are designed to implement uniform, nationwide rules of professional conduct for attorneys who practice before the immigration courts; it does not relate to state oversight of that same conduct, nor does it posit that agency oversight

is the sole means of regulating immigration attorney conduct. Moreover, the statement goes on to further refute Gadda's interpretation by explaining the necessary cooperation between the federal immigration disciplinary process and that of the states:

> EOIR and the Service anticipate working closely with the various state bars when investigating disciplinary complaints. . . . Cooperation between the federal government and the 51 state bar disciplinary authorities will optimize resources and minimize duplication of investigations. In general, state bars have not been resistant to the Federal government's efforts to assist in protecting the public by scrutinizing the professional conduct of attorneys.

Id.

Gadda presents no evidence that the Attorney General has intended, through the applicable regulations, to preempt the field of attorney discipline for immigration attorneys.

The third way in which federal law may preempt state law is through conflict preemption. *See Ting,* 319 F.3d at 1135-36. Preemption may be inferred if there is an actual conflict between federal and state law, or where compliance with both is impossible.

Gadda points to no conflict between California's professional conduct rules and the federal regulations for immigration attorneys. The federal regulations clearly contemplate a state scheme and incorporate the results of state disciplinary proceedings into its disciplinary scheme. The two schemes do not conflict. Gadda fails to show that federal regulation of attorneys before the immigration

courts preempts state regulation of attorneys by express, field, or conflict preemption. *See, e.g., Berger v. Cuyahoga County Bar Ass'n,* 983 F.2d 718, 724 (6th Cir. 1993). Because the Supreme Court of California had jurisdiction to disbar Gadda, the reciprocal disbarments by the BIA and this court are valid.

B. Conduct Unbecoming

Even if the California courts had not acted to disbar Gadda, we have independent authority to suspend or disbar him from practice before the United States Court of Appeals for the Ninth Circuit pursuant to FRAP 46(b)(1)(B). Conduct unbecoming a member of the bar of the Ninth Circuit is sufficient cause for disbarment. Unlike some of our sister circuits, the Ninth Circuit has not adopted local rules elaborating on FRAP 46's "conduct unbecoming" standard. *Cf.* 9th Cir. R. 46-2(a). The Supreme Court has held that "conduct unbecoming" is conduct "contrary to professional standards that show an unfitness to discharge continuing obligations to clients or courts, or conduct inimical to the administration of justice." *Snyder,* 472 U.S. at 645.[7] We have consistently found

[7] The Supreme Court of the United States has never directly construed its own "conduct unbecoming" language. *See* Sup. Ct. R. 8 (providing for suspension for "engag[ing] in conduct unbecoming a member of the Bar of this court"); *cf. Snyder,* 472 U.S. at 643-45 (finding that similarly-worded Appellate Rule 46 was not unconstitutionally vague when read in light of "case law, applicable court rules, and 'the lore of the profession' as embodied in the codes of professional conduct."). In *In re Strickland*, the Court spoke in general terms about its standard for attorneys: "[M]embership in the Bar of the country's highest Court should remain a privilege and a responsibility. . . . [A]n applicant must show . . . that he 'appears . . . to be of good moral and professional character.'" 453 U.S. 901, 909 (1981) (mem.); *see also*

(Continued on following page)

conduct unbecoming where an attorney failed to prosecute an appeal with due diligence. *See, e.g., Matter of Witdhey,* 537 F.2d 324, 326 (9th Cir. 1976) (ordering suspension for failure to prosecute appeal); *Matter of Young,* 537 F.2d 323, 324 (9th Cir. 1976) (threatening to suspend or disbar attorney for failure to prosecute the appeal with due diligence); *In re Margolin,* 518 F.2d 551, 551 (9th Cir. 1975) (holding that undue delay in filing of appeal warrants discharge from further representation, imposition of fine, and indefinite suspension); *United States v. Ferrara,* 469 F.2d 83, 83 (9th Cir. 1972) (per curiam) (fining attorney for failure to prosecute appeal with due diligence pursuant to Rule 46(c)); *In re Chandler,* 450 F.2d 813, 814-15 (9th Cir. 1971) (suspending attorney for three years after first offence of gross negligence, which included the failure to perfect client's appeal and protect claim from default); *United States v. Smith,* 436 F.2d 1130, 1133 (9th Cir. 1970) (ordering suspension for failure to prosecute). Intentional conduct is not necessary for discipline under FRAP 46; lack of diligence that impairs the deliberations of the court is sufficient. *DCD Programs, Ltd. v. Leighton,* 846 F.2d 526, 528 (9th Cir. 1988).

Because we have jurisdiction over appeals from the immigration courts, the quality of the practice by attorneys

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Selling, 243 U.S. at 49 (interpreting predecessor to Rule 8 as requiring "the continued possession of a fair private and professional character"). On those occasions where the Court has applied its own "conduct unbecoming" standard, it has been in response to conduct such as refusing to return excess fees despite a Court order, *In re Gilbert,* 276 U.S. 294 (1928), and failing to respond to communications regarding a pending case, *In the Matter of Davis,* 289 U.S. 704 (1933). *See also In re Discipline of Clinton,* 534 U.S. 806 (2001) (mem.); 534 U.S. 1016 (mem.).

appearing before the immigration courts is crucial to our ability to administer justice and function effectively. The quality of our review is heavily dependent on the record established in administrative immigration hearings, which in turn is dependent on the competence of the attorneys creating that record. Gadda's incompetence impedes our operations and endangers the rights of his clients.

In the course of one immigration matter, for example, Gadda neglected to introduce crucial documents relating to changed country conditions. *In re Gadda,* 2002 WL 31012596, at *11. Although his client was in possession of such documents, Gadda failed to have the documents translated and offered as evidence. *Id.* In that same matter, the Review Department found that Gadda failed to elicit persuasive testimony in support of his client's contention of fear of future prosecution. *Id.* at *11-12. Gadda currently represents petitioners in approximately 50 matters pending before this court. We hold that conduct such as his before the immigration courts is sufficient to constitute "conduct unbecoming" a member of the bar of this court.

C. Inherent Power

We hold that we also have inherent authority respecting the suspension and disbarment of attorneys who perform incompetently in federal immigration proceedings. *E.g., Snyder,* 472 U.S. at 645 n.6 ("Federal courts admit and suspend attorneys as an exercise of their inherent powers; the standards imposed are a matter of federal law."); *Yagman v. Republic Ins.,* 987 F.2d 622, 628 (9th Cir. 1993) ("Courts are endowed with inherent powers which are necessary to the conduct of their business,

including the power to sanction."); *accord Comuso v. National R.R. Passenger Corp.*, 267 F.3d 331, 339 (3d Cir. 2001); *In re Bailey*, 182 F.3d 860, 864-65 (Fed. Cir. 1999); *Matter of Jacobs*, 414 F.3d 84, 87 (2d Cir. 1994); *Berger*, 983 F.2d at 724; *see generally* Judith A. McMorrow & Daniel R. Coquillette, Moore's Federal Practice, The Federal Law of Attorney Conduct, Ch. 807 (3d ed. 2001). This power derives from an attorney's role as an officer of the court which granted the attorney admission to the bar, *Theard*, 354 U.S. at 281; it is necessary to maintain the respectability and harmony of the bar, *Ex parte Burr*, 9 Wheat. 529, 531 (1824), as well as to protect the public, *Theard*, 354 U.S. at 281. We exercise this power with restraint and discretion. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980).

"[T]he behavior for which [an attorney] is disciplined [pursuant to our inherent power] must have some nexus with the conduct of the litigation before the court." *United States v. Wunsch*, 84 F.3d 1110, 1115 (9th Cir. 1996) (holding that the district court did not abuse its discretion by using its inherent power in the course of an ongoing proceeding to sanction a defense attorney who harassed an assistant United States Attorney following defense attorney's disqualification). Such a connection exists in the context of immigration proceedings because, as noted above, we have jurisdiction over appeals from the immigration courts and rely on the records established in those courts.[8]

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[8] Of course, our statutory and inherent powers to regulate attorneys admitted to the Ninth Circuit bar coexist with the separate, independent powers of federal administrative agencies to do the same. *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986) ("[A]gencies have been

(Continued on following page)

III

It is ORDERED that Miguel Gadda, Esq. should be and hereby is disbarred from the practice of law before the United States Court of Appeals for the Ninth Circuit and his name shall be stricken from the roll of attorneys, all pursuant to FRAP 46(b)(1)(A), (B).

Within 21 days of the filing date of this opinion, respondent shall file notices of withdrawal in all cases pending in this court in which he is counsel of record, serve this order on his clients in all pending cases, inform the clients that they must obtain new counsel, and he shall turn over all client files and materials to the clients. Also, within 21 days, Gadda shall file proof with the clerk of this court that he has completed the above requirements. Gadda shall send to the clerk of this court the full identification of his clients in all pending cases in this court and such identification shall include the following information as to each client:

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given the power to police the conduct of those who practice before them."); *see also Checkosky v. SEC,* 23 F.3d 452, 456 (D.C. Cir. 1994) (citing *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 122 (1926)); *Koden v. United States Dept. of Justice,* 564 F.2d 228, 233 (7th Cir. 1977) ("It is elementary that any . . . administrative agency which has the power to admit attorneys to practice has the authority to disbar or discipline attorneys for unprofessional conduct."). *But cf. Hustedt v. Workers' Comp. Appeals Bd.,* 636 P.2d 1139, 1146 (Cal. 1981) (holding that law granting state administrative agency the power to prohibit attorneys from practicing before the agency or any of its judges unconstitutionally restricts the state supreme court's inherent power to discipline attorneys). In the case of agencies, this power, though limited, exists whether or not expressly authorized by statute. *Touche Ross & Co. v. SEC,* 609 F.2d 570, 582 (2d Cir. 1979).

A. Full name

B. Current mailing address

C. Telephone number, if known

D. The Ninth Circuit appeal file number

E. The BIA appeal file number, if any

The Clerk shall deliver certified true copies of this opinion and order to the Clerks of the Supreme Court of the United States and the United States District Court for the Northern District of California, to the California State Bar and to the California State Bar Association, ATTN: Enforcement Department, 180 Howard Street, San Francisco, CA, 94105, and to the Executive Office of Immigration Review, Office of the General Counsel, ATTN: Bar Counsel, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041. *See* 9th Cir. R. 46-2(g).

DISBARRED.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIGUEL GADDA, Esq., Petitioner-Appellant, v. JOHN ASHCROFT, Attorney General, U.S. Attorney General; et al., Respondents-Appellees.	No. 02-15113 D.C. No. CV-01-03885-PJH Northern District of California, San Francisco ORDER
In re: MIGUEL GADDA, Esq., Admitted to the bar of the Ninth Circuit: 23 April 1985, Respondent.	No. 02-80014 Original Proceedings ORDER

(Filed Jun. 3, 2003)

Before: BEEZER, THOMAS, and CLIFTON, Circuit Judges.

Upon due consideration, Miguel Gadda's motion to recall the mandate and issue a stay in the above-captioned actions is DENIED.

APPENDIX 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIGUEL GADDA, Esq., Petitioner-Appellant, v. JOHN ASHCROFT, Attorney General, et al., Respondents-Appellees.	No. 02-15113 D.C. No. CV-01-03885-PJH
In re: MIGUEL GADDA, Esq., Admitted to the bar of the Ninth Circuit: 23 April 1985, Respondent.	No. 02-80014 Original Proceedings ORDER

(Filed May 6, 2004)

Before: BEEZER, THOMAS, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Thomas and Clifton vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX 4

[LOGO]

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

September 14, 2000

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: *Operating Policy and Procedure Memorandum 00-02: Attorney Discipline*

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I. *Introduction*

On July 27, 2000, a revised attorney discipline procedure became effective. See 65 FR 39513 (June 27, 2000). This new process has some significant differences from the former attorney discipline procedures. The grounds for discipline have been revised. More importantly, the attorney discipline procedures have been revamped. The EOIR Office of General Counsel (EOIR OGC) may now investigate and bring attorney discipline charges against practitioners who practice before the Immigration Court. A practitioner who has been issued a Notice of Intent to Discipline, may request a hearing before an Immigration Judge by filing an answer with the Board of Immigration Appeals. Upon receipt of the answer, the Board will forward the case to the Office of the Chief Immigration Judge to assign the case to an Immigration Judge. The Immigration Judge assigned to the case will select a hearing site for the attorney discipline hearing and then conduct a hearing in an Immigration Court.

II. *Filing of Complaints*

Any person, including an Immigration Judge and any other employee of the Immigration Court, may file a complaint against a practitioner who appears in Immigration Court. Complaints must be filed with the EOIR OGC, attention Bar Counsel. *See* 8 C.F.R. § 3.104(a)(1). Any complaints must be in writing and state in detail the information which is the basis of the complaint, including, but not limited to, the name of the complainant and the practitioner, the nature and date(s) of the conduct or behavior, the individuals involved, and the harm caused to the complainant. *See id.* A complaint cannot be made telephonically with EOIR OGC. Complaints can be made

by submitting Form EOIR-44 (Immigration Practitioner Complaint), a letter, or an E-mail.

III. *Initiation of Attorney Discipline Proceedings*

An attorney discipline proceeding is initiated by the filing of a Notice of Intent to Discipline (NID) with the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 3.105(a). Prior to issuing a NID, the EOIR OGC may issue warning letters and admonitions and may enter into agreements in lieu of discipline. *See* 8 C.F.R. § 3.104(c). The EOIR OGC may file a NID based on a practitioner's conduct before the Immigration Courts or the BIA. The Office of General Counsel for the Immigration and Naturalization Service (INS OGC) may file a NID with the BIA based on a practitioner's conduct before the INS.

The regulations provide for an immediate suspension and a summary discipline process. *See* 8 C.F.R. § 3.103. Only the BIA has the authority to immediately suspend a practitioner from practice based on being found guilty of a serious crime, as defined in 8 C.F.R. § 3.102(h), or for a practitioner who has been disbarred, suspended, or has resigned from a state bar, or a state or federal court. Upon the filing of a petition to immediately suspend a practitioner, the EOIR OGC or the INS OGC shall promptly initiate "summary disciplinary proceedings." *See* 8 C.F.R. § 3.103(b). The procedures for summary disciplinary proceedings are the same as a regular disciplinary proceeding. *See id.*

The practitioner has 30 days from the date of service of the NID to file a written answer with the BIA, unless the BIA grants an extension of time. *See* 8 C.F.R. § 3.105(c)(1). Failure to file a timely written answer with

the BIA constitutes an admission of the allegations contained in the NID and the BIA shall issue a final order adopting the recommended disciplinary sanctions in the NID. *See* 8 C.F.R. § 3.105(d)(1). The practitioner may file a motion to set aside within 15 days of the BIA's final order and must establish that his or her failure to respond was the result of exceptional circumstances. *See* 8 C.F.R. § 3.105(d)(2). An attorney discipline proceeding can come before the Immigration Court only when the BIA has accepted the practitioner's answer to the NID.

It should be noted that in the answer to the NID, the practitioner must state whether he or she requests a hearing. *See* C.F.R. § 3.105(c)(3). If the practitioner fails to request a hearing, the opportunity for a hearing will be deemed waived. *See* id. If a practitioner files an answer to the NID which is accepted by the BIA, but fails to request a hearing, the Immigration Judge assigned to the case shall issue a decision based on the NID and the practitioner's answer.

IV. *Assignment of an Immigration Judge*

The charging document in an attorney discipline case will consist of the NID and the practitioner's answer to the NID. Upon the filing of the answer to the NID, the BIA Clerk's Office will create a Record of Proceeding (ROP), which is lavender in color. The ROP, which contains the NID and the answer, will be forwarded to the Chief Clerk of the Immigration Court in the Office of the Chief Immigration Judge.

Unless the Director appoints an Administrative Law Judge to be the adjudicating official, the Chief Immigration Judge will appoint an Immigration Judge to be the

adjudicating official. *See* 8 C.F.R. § 3.106(a)(1)(i). The Chief Immigration Judge may also appoint himself, a Deputy Chief Immigration Judge, or an Assistant Chief Immigration Judge. It is important to note that the adjudicating official cannot be the Immigration Judge who filed a complaint against the practitioner and an Immigration Judge cannot serve as an adjudicating official in a case involving a practitioner who regularly appears before him or her. *See id.*

Upon the appointment of an Immigration Judge to be an adjudicating official, the Chief Clerk of the Immigration Court will forward the ROP to the Immigration Judge assigned to conduct the hearing.

V. *Determining the Hearing Location*

Upon receiving the ROP, the Immigration Judge must first decide where the proceedings will be held. The regulation states that the decision on the hearing location must be made with due regard to the location of the practitioner's practice, the convenience of witnesses, and any other relevant factors. *See* 8 C.F.R. § 3.106(a)(1)(ii). The hearing location must be at an Immigration Court or at a location in which Immigration Judges are regularly detailed.

VI. *Conduct of an Attorney Discipline Hearing*

Because the regulations do not allow an Immigration Judge to be adjudicating official if the practitioner regularly appears before him or her, a significant number of attorney discipline cases will be heard by Immigration Judges who sit in a different Immigration Court from the

hearing site of the attorney discipline proceeding. The traditional notion that the record of proceeding should be located at the Immigration Court where the proceeding takes place will not, therefore, apply. The record of proceeding will remain with the Immigration Judge assigned to the case, regardless of the hearing location. In addition, the legal technician, assigned to the Immigration Judge, may enter information into the ACCESS system concerning the attorney discipline case and send out hearing notices.

An attorney discipline hearing must be conducted pursuant to the procedures found at 8 C.F.R. part 3, subpart C and 8 C.F.R. § 240.9 and shall be open to the public. *See* 8 C.F.R. § 3.106(a)(1)(v). The proceedings must be taped. The practitioner may be represented by counsel who must file Form EOIR-28. The revised version of Form EOIR-28 has a box to specify that a representative is appearing in attorney discipline proceedings.

Immigration Judges may conduct telephonic and televideo hearings. *See* 8 C.F.R. § 3.25(c). If the Immigration Judge would be required to travel to the hearing site to conduct the hearing, the Immigration Judge is encouraged to conduct the initial hearing or any subsequent status hearings by telephone or televideo.

If the practitioner fails to appear at the hearing, the Immigration Judge shall proceed in absentia. *See* 8 C.F.R. § 3.106(a)(2). The practitioner may file a motion to set aside the in absentia order within 15 days of the date of the final order. The standard for granting a motion to set aside is based on exceptional circumstances beyond the practitioner's control.

VII. *Immigration Judge's Decision*

At the conclusion of the hearing, the Immigration Judge may render an oral or a written decision. The Immigration Judge must decide whether the INS or EOIR Office of General Counsel has sustained its burden of establishing each of the grounds for discipline enumerated in the NID by clear, unequivocal, and convincing evidence. *See* 8 C.F.R. § 3.106(a)(1)(iv). Any grounds for discipline set forth in the NID that have not been established by clear, convincing, and unequivocal evidence shall be dismissed. *See* 8 C.F.R. § 3.106(b). If the Immigration Judge determines that the burden has been met, he or she must sustain the charge and decide on a form of punishment. The punishment can be expulsion, suspension, public or private censure, or other sanctions deemed appropriate. *See* 8 C.F.R. § 3.101(a). Regardless of whether the Immigration Judge issues a written or an oral decision, he or she must fill out and sign the attached minute order. See attachment A.

Upon issuing the decision, the parties must be advised that in order to perfect an appeal, the BIA must receive Form EOIR-45 within 30 days after the Immigration Judge's decision or 30 days after the Immigration Judge's written decision was mailed. The Immigration Judge's decision will be final if both parties waive appeal or the party who waived appeal fails to file an appeal with the BIA.

VIII. *Disposition of the Record of Proceeding*

During the pendency of the case, the ROP will be housed in the court from which the Judge was assigned.

If an appeal is filed with the BIA, the BIA Clerk's Office will request the file. If no appeal is filed, the Immigration Court should forward the ROP to the Chief Clerk of the Immigration Court. The closed files will be housed by EOIR OGC.

If there are any questions concerning the attorney discipline process, please contact Loreto Geisse, Counsel to the Chief Immigration Judge at (703)305-1247.

/s/ Michael J. Creppy
Michael J. Creppy
Chief Immigration Judge

Attachment

IMMIGRATION COURT
[ADDRESS]

In the Matter of	Case No: U00-001
TEST CASE	
Practitioner	IN DISCIPLINARY PROCEEDINGS
On Behalf of the Applicant	On Behalf of the INS/EOIR OGC

ORDER OF THE IMMIGRATION JUDGE

ORDER: It is hereby ordered that:

[ ] 1. The ground(s) set forth in the Notice of Intent to Discipline have not been established by clear, convincing, and unequivocal evidence and are, hereby, dismissed.

[ ] 2. The ground(s) (fill in the enumerated charges) set forth in the Notice of Intent to Discipline have been established by clear, convincing, and unequivocal evidence. Any remaining ground(s) set forth in the Notice of Intent to Discipline have not been established by clear, convincing, and unequivocal evidence and are, hereby, dismissed.

The following disciplinary sanction shall be imposed:

[ ] Practitioner shall be permanently expelled from practice before:

[ ] The Board of Immigration Appeals and the Immigration Courts
[ ] The Immigration and Naturalization Service
[ ] Both

[ ] Practitioner shall be suspended from practice before:

[ ] The Board of Immigration Appeals and the Immigration Courts
[ ] The Immigration and Naturalization Service
[ ] Both
Until _____

[ ] Practitioner shall be publically/privately censured

[ ] Other appropriate disciplinary sanction

_____
_____
_____

Date:

_____

[ ]
Immigration Judge

APPEAL: WAIVED/RESERVED
APPEAL DUE BY:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:
MAIL (M)
PERSONAL SERVICE (P)
TO: [ ] PRACTITIONER
[ ] PRACTITIONER'S ATT/REP [ ] INS/EOIR
DATE: _____ BY: COURT STAFF _____